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THE ENFORCEMENT OF CONTRACTS FOR THE SALE OF REAL ESTATE.

The law of Pennsylvania defining the conditions under which the parties to an agreement for the sale of real estate may enforce the agreement, the extent to which they may enforce it, and the manner in which they may enforce it, differs in many important particulars from the law prevailing in other states. These differences, to some extent due to capricious judicial decision, result as the more or less immediate consequences of the following three legal propositions: (1) The common law courts of Pennsylvania administer equitable principles in common law forms of action; (2) the jurisdiction of the equity courts in Pennsylvania depends entirely upon statutory enactments and is not general but confined to certain specifically enumerated subjects; (3) the fourth section of the Statute of Frauds is not a part of the law of Pennsylvania.

INADEQUACY OF THE LEGAL REMEDIES.

It was characteristic of the common law courts of England that they never laid a command upon a litigant nor sought to secure obedience from him. Their commands were directed to their executive officer, the sheriff; and it was through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights were protected by the common law. In some cases the sheriff was commanded to do what the defendant should have done. Thus if real property *belonging*

to the plaintiff was wrongfully detained by the defendant, the command issued to the sheriff was that he should dispossess the defendant and deliver possession to the plaintiff. In the majority of cases, however, the command issued to the sheriff was that he should seize and sell the defendant's property and pay the plaintiff a certain amount out of the proceeds of the sale.

The latter was the only remedy afforded for the breach of a contract to buy or sell property. The common law regarded money as the measure of every loss and afforded no remedy by means of which one could recover the specific property which another had agreed to sell to him. It is true that for a considerable period of time the English law adhered to Frankish custom in not distinguishing between *contract* and *title* as a ground for specific recovery, and allowed a covenant to convey lands to be enforced in an action of covenant, in which the covenantee was entitled to recover the lands, but the use of the action of covenant for this purpose disappeared at an early date,[1] and an action for damages became the only remedy for breaches of contracts to sell property.[2] The idea of the common law judges as expressed by Coke, C. J., was that to enforce a contract specifically "would subvert the intent of the covenantor, since he intended to have his election to pay damages" or to perform the contract.[3]

In regards to contracts for the sale of personal property the remedy afforded by the common law was in most cases adequate. The common law rule respecting the sale of chattels was that where there was an unconditional contract for the sale of specific goods, the title to the goods passed to the buyer when the contract was made, and it was immaterial whether the time of payment, or delivery, or both, were postponed. If under the rule, the title had passed to the buyer he was entitled to bring an action of detinue for their recovery in specie. Detinue was, in theory, a proprietary action. By it the plaintiff sought the recovery of the goods in specie. It has been said to be "the

[1]Martin's Civil Procedure 46.

[2]Fry on Specific Performance 27

[3]Bromage v. Jenning, 1 Roll R 368. The view that a party when he gives a promise must be held to contemplate the payment of damages or performance at his option has recently been asserted by high authority, Justice O. W. Holmes, but is not generally accepted.

only remedy by suit at law for the recovery of a specific chattel in specie unless in those cases where replevin lies."[4] As a matter of fact, however, even in detinue, an obstinate defendant could not be forced to give up the chattel itself. The judgment is in the alternative, i. e., for the return of the chattels claimed *or their value* with damages,[5] and the practical working of this judgment resolved the proceeding into an action for damages as far back as Bracton's time;[6] and, as in the action of detinue the defendant could wage his law, the action was surplanted by trover, which was free from wager of law, and which accomplished the same purpose, to wit; a judgment in damages for the value of the goods detained.[7]

The action of replevin for the recovery of the possession of specific chattels could, at common law, be maintained only where the goods were wrongfully *taken* from the owner. It did not extend to cases of wrongful *detention* merely, and, therefore, was not available to one who sought to recover in specie goods which he had purchased.[8]

If under the rules of the common law the title to the goods which were the subject of contract had not passed to the purchaser, his only remedy was an action for damages. The measure of damages was the difference between the contract price and the market value at the time and place of delivery.

Whether the purchaser recovered the value of the goods in an action of detinue or trover or damages for the loss of his bargain, his remedy was in most cases adequate. In either case, the money so obtained enabled him to go into the market and purchase property of the same kind and quality. The object of the purchaser is not ordinarily the possession of any specific grain, lumber, or other chattel to which the contract relates. Any grain, lumber, etc., conforming to the description in the contract will answer the object of the purchaser as well; and, therefore,

[4]Perry Common Law Pleading 56.

[5]Perry Common Law Pleading 56.

[6]Martin's Civil Procedure 78.

[7]Martin's Civil Procedure 125.

[8]Martin's Civil Procedure 98. In practice the action was confined to cases where there had been a wrongful distress. It has subsequently been extended so as to include all cases where one man claims personal property which is in the possession of another.

if he is allowed such damages as will enable him to go into the market and purchase the same kind and quality of goods, complete justice has been done. Where, however, the property had either a pretium affections, or value from some other peculiar cause, or could not ordinarily be bought in the market, or had a value which could not be estimated by any known common law rules, the common law remedies were manifestly inadequate.

In the case of real property, as in the case of personalty, the common law afforded a remedy whereby property *belonging to* the plaintiff could be specifically recovered. But the title to real property did not, as in the case of personalty, pass to the purchaser upon the making of an unconditional contract for its sale. Certain additional acts of a formal character were necessary before the title would pass. Where the title had not passed, the possession could not be recovered by the purchaser in any common law action. The only remedy afforded was an action for damages.[9] The measure of damages in this action is a matter as to which there is considerable conflict of authority,[10] but, conceding that the vendee might recover the loss of his bargain, it is obvious that the legal remedy was nevertheless generally inadequate. Immobility is a distinguishing characteristic of real property and this renders it necessary, in estimating its value, to consider an element which need not ordinarily be considered in estimating the value of personalty. This element is *location*. The value of real estate is chiefly determined thereby, and it is nearly always a controlling consideration in the making of a contract for the sale of real property. It follows that the action at law for damages was not an adequate remedy because, since no two pieces of real estate can have the same location, the money recovered by the purchaser did not enable him to go into the market and purchase property having the *same location*.

This difference between real and personal property was not recognized by the common law judges. In Gollen v. Bacon, 1 Bulst 112, Fleming, C. J., said, "If one does promise for to give me a horse for twenty shillings, afterwards he does not perform this; I am not to go and sue in chancery for my remedy, but at common law by an action on the case to recover damages; and if the law be so in case of a horse a multo fortiori it will be so

[9]Bispham's Equity 516.
[10]1 Sugden V. & P. 542.

in case of a promise to make an assurance of his land upon good consideration."

THE EQUITABLE REMEDY OF SPECIFIC PERFORMANCE.

Courts of equity have always employed the very methods of compulsion and coercion which the common law courts wholly rejected. When a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing; then by its decree or order, it commands *him* to do or refrain from doing what it has decided he ought to do or refrain from doing; and finally, if he refuses or neglects to obey the decree, it punishes him by imprisonment. This method was borrowed by the early chancellors from the canon law.[11]

In accordance with this system courts of equity began, at an early date, to decree specific performance of contracts for the sale of property.[12] Such jurisdiction was assumed in regards to both personal and real property.[13] The origin and early grounds of the jurisdiction are probably conjectural, but the accepted theory is that the jurisdiction was assumed because of the inadequacy of the remedies at common law;[14] and the inadequacy of the legal remedy is still stated as the test of the jurisdiction.[15] "The doctrine is fundamental that specific performance will be decreed only in those classes of cases, in which, according to the views taken by the courts of equity, the legal remedy of conpensatory damages is, from its essential nature, insufficient and fails to do justice between the litigant parties."[16] In applying this rule, however, courts of equity have established the further rule that the legal remedy of damages is inadequate in all agreements for the sale of real estate, and therefore in such cases specific performance is always granted unless prevented by other independent equitable considerations. It is as much a matter of course for a court of equity to give specific performance as it is for a court of law to give damages, and no cases can be found where equity has declined jurisdiction in

[11]See Landell, Brief Survey of Equity Jurisdiction 26, for the reasons which caused the adoption.

[12]Bispham's Equity 516.

[13]26 A. & E. Encyc. 103.

[14]Fry on Specific Performance 30.

[15]26 A. & E. Encyc. 17, 103.

[16]1 Pomeroy's Equity 309.

reference to a contract for the sale of real estate on the ground that the purchaser had an adequate remedy at law.[17]

Specific performance was first decreed in favor of the vendee. The earliest reported case is Cokayn v. Hurst (1458). For nearly a century this case remained the only reported instance of a decree for the specific performance of a contract. The assumption of this jurisdiction by the courts of equity was strongly opposed by the common law judges and it was not until the reign of James I that the jurisdiction of the equity courts to decree specific performance was firmly established. Since that time the jurisdiction of equity has been unquestioned. Having gone this far the courts of equity went further and declared that the vendor should also have their aid if the vendee refused to execute his contract. Since the vendee's duty generally consists in nothing beyond the payment of money, the necessity for the intervention of a court of equity in behalf of the vendor is not apparent. It is settled, however, with scarcely any dissent,[18] that specific performance will be granted in favor of the vendor of land as freely as in favor of the vendee, though the relief actually obtained by him is usually only a recovery of money—the purchase price.[19] In explanation of this rule various theories have been advanced. It has been said that the remedy in equity is based upon the inadequacy of the remedy at law, the latter remedy being inadequate because the measure of damages is the difference between the market price and contract price, whereas the vendor might stand in need of the whole sum agreed to be paid. The objection to this theory is that, if carried to its logical conclusion, it would render every contract for the sale of personal property specifically enforceable in equity at the suit of the vendor. The doctrine of equitable conversion, whereby the vendee becomes a trustee of the purchase price for the vendor, has also been advanced as an explanation of this rule. The objections to this theory are that the trust is a purely constructive trust and results from, rather than creates the right to specific performance.[20] The inadequacy of this theory is further shown by the fact that, though the doctrine of equitable conversion does not extend

[17]Merwin's Equity 33. But see 26 A. & E. Encyc. 18.

[18]As to the exceptional rule in Pennsylvania see infra.

[19]6 Pomeroy's Equity 1261.

[20]Bispham's Equity 454.

to contracts for the sale of chattels or things in action, the cases are numerous in which such contracts have been specifically enforced at the suit of the vendor.[21] The usual and most satisfactory explanation of the rule is the doctrine that where an equitable remedial right is recognized in favor of the vendee, a corresponding remedial right should be recognized in favor of the vendor in order that the remedies may be mutual.

The remedy of specific performance is one of the most beneficent in the whole range of equity jurisprudence. It "prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at their pleasure by electing to pay damages for their breach."[22]

It is also an extraordinary and distinctive remedy and is one of the paradoxes of legal history. Popular government has attained its highest development in the United States and the British Empire, yet only in these two countries is it permitted to so far invade the liberty of the individual as to compel him specifically to perform his contract or to suffer imprisonment. The doctrines of equity are derived, to a great extent, from the civil law but "Nemo potest praecise cogi ad factum" was the rule of the civil law. In France and Germany, and presumably other European states, pecuniary compensation is the sole remedy for a breach of contract.[23]

HISTORY OF THE EQUITY JURISDICTION OF THE EARLY COURTS OF PENNSYLVANIA.

The law of Pennsylvania furnishes, to both vendor and vendee, methods for obtaining specific performance of contracts for the sale of real estate, but these methods differ materially from those in use in other jurisdictions. These differences are due to historical accidents in the development of equity in Pennsylvania, and a knowledge of the history of equity in Pennsylvania is necessary in order that they may be understood. From 1664 until 1681, with the exception of a brief period (1673-1674), the government of New York extended over the territory subsequently granted to William Penn. It is a matter of record that during

[21]Withy v. Cottle, 1 Sim. & St. 174; Adderly v. Dixon, 1 Sim. & St. 607; Cogent y. Gibson, 33 Beav. 557.

[22]Fuller, C. J., in Union Pac. Ry. Co. v. C., R. I., & Pac. Ry. Co., 163 U. S. 600.

[23]See article by James B. Ames, 1 Green Bag 26.

this period chancery jurisdiction was exercised by the Governor of New York over what subsequently became the Province of Pennsylvania.[24] The charter of Pennsylvania was granted to Penn on March 4th., 1681. The fifth section of the charter vested in Penn the right of appointing judges and establishing courts with such powers and forms of procedure as should seem to him most convenient. In deference to the wishes of the people, Penn was willing to relinquish this extraordinary right. By the Frame of Government, which was drawn up by Penn in England, and which constituted the constitution under which the Province of Pennsylvania was organized, the government was entrusted to the Governor and freemen of the province. The freemen were to elect a Provincial Council and a General Assembly. The power of erecting courts was entrusted to the Governor and Council, but it seems that this provision was never practically carried out, for when new courts were created, the concurrence of the Assembly was invariably required to the bill for their erection.[25]

After drawing up the Frame of Government, Penn sent his cousin, William Markham, to take possession of the province and act as deputy Governor. Markham arrived about July 1st, 1681, but did little in the way of establishing a government. In the fall of 1692, Penn sailed for Pennsylvania, and arrived in New Castle on October 27th. Two days later Penn went to Upland, which is now Chester, to call the first Assembly. No Council having been chosen, the Assembly met alone and passed what has ever since been called the "Great Law" of Penna.

The Great Law provided that in every county there should be one court erected; from this lay an appeal to the Provincial Court, composed of not less than five judges who should hold quarterly sessions; and from this court an appeal lay to the Provincial Council which was the court of last jurisdiction. The jurisdiction of the county courts was at first of a singularly indefinite character, and seems not to have included equity powers.[26] Penn apparently was not an admirer of equity courts. In a letter dated August 16th, 1683, he describes the Indians as "not perplexed by chancery suits," and refers to the erection of

[24]Hazard's Annals of Penna., 424.
[25]Lewis, Courts of Penna. in the 17th Century.
[26]Lewis, Courts of Penna. in the 17th Century.

courts of justice in every county.[27] No Provincial Court was established until 1684, and until that date the Provincial Council, when called upon, no doubt exercised chancery jurisdiction as it had been exercised before the charter by the Governor of New York.[28]

In 1684 two bills respecting equity courts were passed. The first provided that the county courts should be courts of equity as well as of law. The second created a Provincial Court which was to be a court of appeal from the county courts, and which was also to try all cases, both in law and equity, not triable in the county courts.[29]

Little is known of the form of procedure under these acts. Notwithstanding the statement of Mr. Laussatt to the contrary,[30] the distinction between the law and equity sides of these courts was strongly marked;[31] and the proceedings on the equity side were according to the rules of chancery practice.[32] Instances are extant in the early history of Pennsylvania when a court, sitting in equity, reversed its own judgment, previously entered while sitting as a court of law.[33]

It is believed, however, that little business was transacted on the equity side of either of these courts;[34] and it is also very probable that the equity administered was not the technical and scientific equity of lawyers, but a sort of natural equity based upon popular rather than technical notions of equity.[35] There is evidence that the people did not have a clear conception of the equitable powers of these courts, for, in 1687, the Assembly desired the Council to explain how far the courts "may be judges of equity as well as law.[36] To this inquiry the Council made an evasive and equivocal answer.[37]

[27]Proud's Hist. of Penna., 262.

[28]Wilson's Chancery in the Colonies.

[29]Duke of York's Laws, 167, 168.

[30]Laussatt's Equity in Pa., 20

[31]Rawle's Equity in Pa. 10.

[32]Courts of Pa. in the 17th Century.

[33]Hastings v. Yarnall, Records Chester Co. Ct., 3 d. 1 wk. 10 mo. 1686. 5 d. 1 wk. 10 mo. 1686.

[34]Fisher's Equity in Penna.

[35]McCall's Address before Law Academy of Phila., 1838.

[36]1 Colonial Records, 142.

[37]1 Colonial Records, 441.

At this period in the history of Pennsylvania, there seems to have been a party which entertained a strong distrust of equitable powers. In 1690 a bill to strike out the word equity from the powers given to the courts passed first reading in the House,[38] and though never actually passed, it "doubtless represented the views of many in the Province."[39]

The complaints of the people were principally concerning the practice of the equity courts in reversing judgments previously obtained at law. Though from the very first there seems to have been a party which disapproved on principle of chancery powers, it is a mistake to suppose that the people were unanimously opposed to the introduction of equity jurisdiction. Throughout the entire early history of Pennsylvania there was always a party which wanted courts of chancery and made efforts to get them.

In 1690 an act was passed confirming the equity jurisdiction of the county courts but limiting it to causes under the value of ten pounds. The English Government repealed this law in 1693. It was reenacted in 1700, but apparently produced no results.[40]

In 1701 an elaborate act remodelling the courts of the colonies, and apparently repealing all prior regulations concerning equity, was passed. This act gave equity powers to the Common Pleas courts and an appeal in equity cases to the Supreme Court. The act provided that the proceedings should be by bill and answer with such other pleadings as are necessary in chancery courts.[41] It has been stated that "nothing came of this act."[42] Certain it is that in 1703 complaint was made that, to the great oppression of the people, no court of equity had been held in pursuance of this law.[43] The act was repealed by the home government in 1705.

At this period began the long and bitter quarrel between the Governor and Provincial Council and the General Assembly upon the question whether the Governor of the Province should be chancellor. The Governor contended that he, by virtue of

[38]1 Votes of Assembly, 57.

[39]Lewis, Courts of Penna. in 17th Century.

[40]Duke of York Laws, 184, 225.

[41]2 Colonial Record, 23.

[42]Fisher's Equity in Pa.

[43]2 Colonial Records, 115.

his commission, was entitled to be chancellor, while the Assembly was opposed to any extension of the Governor's power. The question was bitterly contested on each side and lasted throughout three entire sessions.[44] At last in 1710, after the death of Governor Evans, who had claimed the office of chancellor for himself, an act was passed which provided that a court of equity should be held by the Common Pleas four times a year in every county, and that these courts should observe as near as may be the practice of the courts of chancery in England.[45] Appeals could be taken to the Supreme Court and questions of fact were to be decided by issue at law before the Common Pleas. The act was repealed within three years on the ground that it would make proceedings in equity very dilatory and unnecessarily increase the business of the common law courts.

Two years later another attempt was made by the passage of an act providing for the establishment of a Supreme or Provincial Court of Law and Equity. It was provided that the procedure should be according to the English chancery practice. This act was repealed in England in 1719.[46] "The colonists had, by the terms of their charter, five years within which to transmit their laws for approval, and, after their passage, they would keep them here and act under them as long, within that period, as they decently could; they were then sent to England and, when repealed there, other laws, as nearly similar as they dared to pass would be enacted here."[47] This has been suggested as the reason why so long a time elapsed between the organization and abolishment of the various courts having chancery jurisdiction to which reference has been made.[48]

In 1717 William Keith became Governor of Pennsylvania. At the time of his accession complaints as to the administration of justice were constantly being made. Courts had not been held for many years, and " the confusion of the judiciary had reached an alarming height and was the cause of great injury to the colonists."[49] To remedy these conditions, courts of inferior

[44]2 Colonial Records, 274, 288.

[45]Bradford's Laws, Ed. 1714, p. 120.

[46]1 Carey and Boren Law of Pa., 110.

[47]Rawle's Equity in Pa., 18.

[48]Rawle's Equity in Pa.

[49]Laussatt's Equity in Pa., 22.

and superior jurisdiction were immediately erected, and in 1720 Keith, in a message to the assembly, suggested the erection of a court of chancery and requested the opinion of the assembly in respect thereto. On the next day a resolution was unanimously passed by the assembly requesting the Governor, "to open and hold a court of equity for the province, with the assistance of such of his council as he shall think fit etc."[50] On the tenth of August, 1720, the Governor, with the consent of the Council, issued a proclamation creating a court of chancery and granting to it the same powers and jurisdiction as were possessed by the court of chancery of England. It was provided that the Governor should be chancellor, but that no decree should be pronounced by him without the assent of two or more of his six oldest counsellors. This provision for the introduction of chancery powers differed from all previous attempts. By their previous legislation the colonists had attempted to give chancery jurisdiction to the common law courts,—to create courts having a law and an equity side. The proclamation of 1720 created a chancery court as a distinct tribunal. It was the first, last, and only separate court of chancery that Pennsylvania ever had.

The government in England seems not to have objected to this court, and did not interfere with it. It lasted for sixteen years and transacted considerable business. Unfortunately for the court's existence the Governor was its chancellor, and the people were so jealous of any power exercised by the king, or his representative, the Governor, that in 1736 petitions were presented to the Assembly complaining of the court as a violation of the Charter of Privileges, granted by Penn to the people in 1701, which provided that no person should, at any time, be obliged to answer any complaint relating to property before the Governor and Council, or in any other place but in the ordinary courts of justice.[51] The Assembly took the same view, and a bill was introduced vesting the power of determining suits in equity in the Common Pleas judges. After an angry correspondence between the House, on one side, and the Governor[52] and Council, on the other, the Assembly adjourned without passing the act, and the Governor continued to act as chancellor

[50]3 Col. Records, 100.
[51]Charter of Privileges, sec. 6.
[52]Gordon had succeeded Keith in 1726.

until his death, which occurred a few months afterward. Logan, who succeeded Gordon, yielded to the views of the Assembly and no subsequent governor has ever attempted to exercise chancery powers.

For the next hundred years little was accomplished toward the introduction of chancery jurisdiction. By the constitution of 1776 the courts were given the powers of a court of equity so far as related to the perpetuation of testimony, the obtaining evidence from places outside of the state, and the care of the persons and property of the insane; and the legislature was given power to grant to the courts such other chancery powers as should be found necessary, not inconsistent with the constitution. The only additional powers granted by the legislature were a method of supplying lost deeds and instruments,[53] and a proceeding in the nature of a bill of discovery against garnishees in foreign attachments.[54]

In 1790 a convention was called for the purpose of adopting a new constitution. The question of giving chancery powers to the courts, and, indeed, of creating a separate court of chancery was carefully considered, but, in spite of the strenuous efforts of some of the most distinguished members of the convention, little was done towards introducing chancery jurisdiction. The only change made was that, in place of the concluding clause of the constitution of 1776, the following clause was inserted in that of 1790, "and the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary; and may, from time to time, enlarge or diminish those powers, or vest them in such other courts as they shall judge proper for the administration of justice." Power was thus given to the legislature to establish a separate court of chancery. This power was never exercised.

In fact, for nearly half a century, the legislature did little in the way of exercising the power given to it by the constitution. From 1790 to 1836 the only additional chancery powers given to the courts were the power to compel trustees to account, to appoint and dismiss them, and to compel the specific performance of contracts to sell lands, in cases where the grantor had died.

It appears, therefore, that, for a period of over one hundred

[53] Act of March 28, 1786.
[54] Act of September 28, 1789.

and fifty years, with the exception of a period of sixteen years (1720-1736) the Commonwealth of Pennsylvania was compelled to administer justice without the aid of a court of equity, and, indeed, without a court possessing, except to a very limited extent, chancery powers; and that this state of things was occasioned not entirely by "the jealousy of the principles and practice of that court entertained by the people," but first, by the conflict of opinion between the legislature of the Province and the privy council in England, as to the expediency of establishing a court with chancery powers; secondly, by the conflict between the governors and the legislature as to who should be chancellor; and finally, after the revolution, by the distrust entertained by the colonists of everything that savored of unusual power, and the belief, which existed in many quarters, that the necessity for the granting of chancery powers had been obviated by the actions of the common law courts.

EQUITABLE PRINCIPLES ADMINISTERED THROUGH COMMON LAW FORMS.

The necessity for some method of administering equitable principles was appreciated by the courts at an early date. It was soon found that, in a growing and enlightened community, whose natural resourses were great, industries varied, and whose trade and commerce were extensive and growing, the lack of some method of administering equitable principles meant, in many cases, a failure of justice. In the absence of a court having chancery jurisdiction, the judges were compelled, in order to prevent this failure of justice, to invent some method of administering equity. This was accomplished by the adoption of the principles, doctrines, and rules, of equity as a part of *the law* of the state. The decision in common law actions was made to depend, not solely upon the strict rules of law, but upon the rules of equity as well; and, as a consequence, the scope and effect of the common law actions were greatly modified. Common law actions were used to enforce purely equitable claims; purely equitable defences were permitted in such actions; and, to a very limited extent, purely equitable reliefs were obtained by means of actions at law. The courts "dug channels through the barriers of the common law and through them they attempted to make the waters of equity flow."[55] "They adopted equitable

[55]Fisher, Equity in Penna.

principles without disturbing the ancient landmarks of the law. They let in the changes called for by progressive improvement at every point where they had a real and living place of usefulness, but in the absence of a court of chancery they wrought them into the fabric of law as it was, and administered them with admirable ingenuity through common law forms."[56] The precise time at which the courts began to administer equitable principles through common law forms is not known. There are authorities which say it was done from the beginning.[57] This, however, has been questioned by high authority.[58] The first reported case on the subject is Swift v. Hawkin, 1 Dallas 17, decided in 1768, in which, in an action of debt on a bond, the defendant was permitted to prove failure of consideration on the ground that, since "there was no court of chancery in the province," it was necessary in order to prevent a failure of justice. The Chief Justice added that he had known this to be the practice for thirty-nine years past.[59] This system was consistently developed by the courts, and at the present time it may be said, "All courts in Pennsylvania are Courts of Equity, whether proceeding by bill or action at law."[60]

SPECIFIC PERFORMANCE IN COMMON LAW ACTIONS.

By means of this system, which is correctly described as the administration of equitable principles through common law forms, fairly adequate methods of obtaining specific performance were afforded both vendor and vendee.

The vendor of lands was permitted to recover possession, if withheld from him by the vendor, in an action of ejectment. The vendee's title is not a legal title, and the use of the action of ejectment in this connection was, therefore, in direct contravention of the well settled common law rule that to support ejectment the plaintiff must be clothed with the legal title to the lands in question.[61] The exact time at which this method originated is not known.[62] In the first reported case, Hawn v. Norris, 4 Binney 78, (1811), the court charged the jury that "although

[56]Morton's Estate, 201 Pa. 271, Per Mitchell, C. J.
[57]Brightly, Equity in Pa. 5, Laussat, Equity in Penna., 55.
[58]Rawle, Equity in Penna., 52.
[59]But as to this statement see Rawle, Equity in Penna., 55.
[60]Sime v Norris, 8 Phila. 84, per Sharswood, J.
[61]10 A. and E. Encyc., 482.
[62]Laussatt, Equity in Pa., 252.

ejectment was not a mode of enforcing articles of agreement according to the law of England, because there the party might go into a court of chancery, and the chancellor if it was a proper case would decree a deed; yet in Pennsylvania for want of a court of chancery a practice had arisen at a very early date of enforcing articles by ejectment whenever a chancellor in England would enforce them." The court further stated that the power of the courts thus to enforce agreements had been frequently exercised before seventeen hundred and ninety.

This case was followed by many others, and it is now a well established rule that an action of ejectment may be maintained by the vendee against the vendor to enforce specific performance of a contract for the sale of real estate whenever a court of equity would sustain a bill for that purpose.[63] In the use of the action of ejectment for this purpose the courts adopted the chancery principle that that shall be considered as done, which in equity and good conscience should have been done originally.[64] This action is in substance a bill for specific performance and is governed by the principles of equity. "An ejectment to enforce specific performance of a purchase, being with us a substitute for a bill in equity," says Gibson C. J.,[65] "is affected with all those considerations that would affect a bill for that purpose in the contemplation of a chancellor."

The action of ejectment was the usual method by which contracts for the sale of realty were specifically enforced at the suit of the vendee until a very recent date, and is still frequently used for that purpose.

In addition to the action of ejectment, another method of obtaining specific performance was furnished to the vendee. He could enforce specific performance by means of an action of covenant, assumpsit, or debt, by asking for a verdict for the value of the land or such other sum as would compel the vendor to make a deed rather than pay the damages, and the verdict of the jury would be given for this sum, subject to the condition that it should be released upon the making of a deed within a specified time and the paying of the costs.[66] In regard to this

[63]P. and L. Dig. Dec. Vol. 5, c. 7408.

[64]Christy v. Brien, 14 Pa., 249.

[65]Brawdy v. Brawdy, 7 Pa., 158.

[66]Irvine v. Bull, 7 Watts, 323, Stevenson v. Kleppinger, 5 Watts, 420, Decamp v. Feay, 5 S. and R., 323, Findlay v. Keim, 62 Pa., 116, Waflzener v. Roth, 93 Pa., 443.

method of enforcing specific performance it was said that "not having a court of chancery our predecessors adopted modes of using and applying common law actions, unknown where there is a common law court and also a court of chancery."[67]

Two methods were also provided by which a vendor could obtain specific performance. He was permitted to recover, in an action of debt, covenant, or assumpsit, the purchase price agreed upon in the contract of sale.[68] This was a direct violation of the common law rule that in an action at law the vendor could not recover the purchase price, but merely damages for the breach of the contract, and that the measure of damages was the difference between the market price and the contract price.[69] The common law action when used for this purpose is in the nature of a bill for specific performance and the rules of equity determine whether or not a recovery shall be had.[70]

In explanation of the use of common law actions for this purpose it was said, "In England the remedy in this case would properly be in a court of chancery. We have no such court in this state; but it has been long and well established that equity is a part of the law of Pennsylvania, and lest there should be a failure of justice, our courts, blending the principles of equity with the dry rules of the common law, with the aid of a jury, will do what a court of chancery would do; and this practice is essential in many cases to the due administration of justice."[71] "For want of courts of chancery we are obliged in our practice to adopt chancery principles and chancery remedies in many instances in which such a course is refused by courts of common law in places where there is a court of chancery."

Another method of obtaining specific performance was provided for the vendor by the common law courts. The common law rules relating to the action of ejectment were so modified as to permit its use by the vendor as a substitute for a bill for specific performance. The purpose for which an action of ejectment was brought at common law was to obtain possession of

[67]Irvin v. Bull, 7 Watts, 323, per Huston, J.

[68]Magaw v. Lathrop, 4 W. and S., 316, Ellet v. Paxon, 2 W. and S., 418, Murray v. Ellis, 112 Pa., 485, Tripp v. Bishop, 56 Pa., 427, Bower v. Cisna, 62 Pa., 149.

[69]29 A. and E. Encyc., 719-720.

[70]Magaw v. Lathrop, 4 W. and S., 321, Huber v. Burke, 11 S. and R.,

[71]Huber v. Burke, 11 S. and R., 238, per lower court.

[72]Magaw v. Lathrop, 4 W. and S., 321, per Sergeant, J.

real estate. The verdict in the action was unconditional; if for the plaintiff, it gave him the unconditional right to obtain possession by legal process; if for the defendant, it gave him the unconditional right to retain possession. The plaintiff could not recover unless clothed with a legal title,[73] and it was equally well settled that the defendant could not set up an equitable title as a defence.[74] A vendee in possession under a contract of sale could not set up the contract as a defence. The only remedy available to him was a bill in equity for specific performance and an injunction against legal proceedings by ejectment in the meantime.[75]

In Pennsylvania the courts recognized and administered, in the action of ejectment, the equities of the vendee arising from the contract of purchase. The contract was held to be a good defence to an action of ejectment in any case where it would have furnished sufficient ground upon which a court of equity would have issued an injunction to restrain the action,[76] and, as the injunction of the chancellor was conditioned upon the vendee's performing his duty under the contract, so the contract was admitted as a defence to the ejectment only upon the condition that the vendee perform his duty within a specified time.

As a result the action of ejectment came to be used in Pennsylvania as a substitute for a bill for specific performance. The vendor used the action for the purpose of constraining the vendee either to abandon possession, or to perform his duties under the contract.[77] If, as a defence to the action, the vendee showed facts which entitled him, on the performance of certain acts, to retain possession, the verdict was for the plaintiff, subject to the condition that it should be defeated if, within a certain time, the defendant should perform these acts. If within the time mentioned in the verdict the defendant did not perform his duties

[73]10 A. and E. Encyc., 533.

[74]10 A. and E. Encyc., 533.

[75]See Crosbie v. Tooke, 1 Mylne and Keen, 431.

[76]Forum Vol. XI, No. 5, p. 1. In Greenlee v. Greenlee, 22 Pa., 226, it is held that an ejectment by the holder of the legal title is to be regarded in the light of a bill in equity and may be defended against by proof of a contract which might be *insufficient* to justify a decree for specific performance.

[77]Shaw v. Bayard, 4 Pa., 257; Riel v. Gannon, 161 Pa., 289.

under the contract, his equities became extinct.[78] The vendor's action presupposed that he still retained the legal title. If he had conveyed the title the remedy was not available.[79]

The use of the action of ejectment in this manner violated the well setled common law rule that a defendant could not set up an equitable title as a defence to an action of ejectment, and the equally well settled rule that a verdict in a common law action could not be conditional. The action is still used for this purpose in Pennsylvania.[80]

EQUITY JURISDICTION GIVEN TO THE COURTS.

Admirable as were the devices and contrivances by which the courts sought to obviate the evil effects arising from the lack of chancery juridiction, they were found inadequate to the requirements of a large and prosperous state.[81] To give effect to equitable principles in actions strictly according to the common law was no easy task.[82] The success of the Pennsylvania courts in so doing has been described as "the greatest achievement in modern jurisprudence."[83] When, however, it came to *equitable remedies* and the *practical execution* of equitable doctrines the common law courts failed. The common law courts offered no remedies which were adequate substitutes for the remedies of equity, and from the lack of these remedies the Pennsylvania system was unable to supply the needs of a great commercial state. It is true (as has already been shown) that in some cases equitable reliefs were obtainable through the verdict of a jury in a common law action, and it has been ably argued that if the common law courts had been a little more pliant and ingenious, adequate substitutes for *all* the remedies of equities could have been provided. To this day there are able lawyers in the state who maintain that the Pennsylvania system of administering equity through common law forms was capable of such development as to fulfill all the requirements of the state, and that the giving of equity *powers* to the courts by the legislature was entirely unnecessary.

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[78]Forum Vol. XI, No. 5, p. 108.
[79]Forum Vol. XI, No. 5, p. 100.
[80]See Adams v. Barrel, 26 Super. Ct. 641.
[81]Morton's Est., 201 Pa., 271.
[82]Huber v. Burke, 11 S. and R. 245, per Gibson.
[83]Morton's Est., 201 Pa., 271.

The legislature evidently thought otherwise. When the early prejudice against chancery had measurably died out, a change took place in legislative policy. The statutes already cited show that as a first step in the execution of this new policy a few specified equitable powers were conferred upon the courts. In 1830 a commission was appointed by the legislature to revise the whole civil law of the state. In their report to the legislature the commission recommended that the law courts be given full chancery powers in regards to: (1) trustees; (2) trusts; (3) control of private corporations, unincorporated societies and partnerships; (4) discovery; (5) interpleader; (6) injunctions; (7) specific performance. In 1836 the legislature passed a bill giving to the common pleas courts of the several counties of the state and to the Supreme Court, equity jurisdiction in the first three cases suggested by the commissioners.[84] To the Supreme Court sitting in banc in Philadelphia and to the common pleas courts of Philadelphia they gave equity jurisdiction in all the cases reccommended by the commission.[85]

In 1840 the several courts of common pleas of the state were given the powers and jurisdiction of a court of equity in cases of account.[86]

Philadelphia County was given equity jurisdiction in cases of fraud, accident, mistake and account in 1840,[87] and in 1845 it was provided that this statute should be construed to give jurisdiction "whether such fraud, mistake, accident, or account, be actual or constructive."[88] The jurisdiction of Philadelphia County was extended to cases of dower and partition by the act of March 17th, 1845.[89] In 1851 a bill was passed giving to the courts of common pleas of the several counties "the same chancery powers and jurisdictions which are now by law vested in the court of common pleas of the city and county of Philadelphia."[90] As a result of this legislation the Pennsylvania courts possess "nearly the whole jurisdiction of chancery." It is well settled,

[84]Act of June 16, 1836, sec. 13, P. L. 789.

[85]Idem.

[86]Act of Oct. 13, 1840, sec. 19, P. L. (1841) 7.

[87]Act of June 13th, 1840, P. L. 671.

[88]Act of April 13, 1845, P. L. 542.

[89]P. L. 160. See also the act of April 22, 1863, P. L. 519. By the act of July 7th, 1885, P. L. 257, this jurisdiction was extended to all the counties in the state.

[90]Act of Feb. 14th, 1857, P. L. 39.

however, that the courts of equity in Pennsylvania do not possess the general powers of a court of chancery but only such as have been conferred upon them by statute, and that the powers of the courts are limited to cases which have been specified by the legislature. Cases have frequently arisen of which the Pennsylvania courts have refused to take cognizance, though plainly within the jurisdiction of a court possessing general chancery powers.[91]

SPECIFIC PERFORMANCE IN THE EQUITY COURTS OF PENNSYLVANIA.

The necessity of resorting to an act of assembly as a warrant for exercising equity jurisdiction in any case has lead to a curious result in regards to the specific performance of contracts. The act of 1836, as extended by the act of 1851, gives to the courts of common pleas "the power and jurisdiction of a court of chancery so far as relates to the affording specific relief when a recovery in damages would be inadequate.

In Kaufman's Appeal 55 Pa. 383, it was held that, under this statute, the courts did not have jurisdiction to entertain a bill for specific performance on behalf of the vendor where the decree sought was simply one for the payment of the purchase money. The decision was based upon the principle that, as the demand of the vendor was simply for the payment of the purchase money, which could be as readily recovered in an action at law, the case did not fall within the equity head of granting "specific relief where a recovery in damages would be inadequate," and that to allow a resort to equity in such a case would be to annul the legislation of the state, which confines the executions for debt to the property of a citizen, by extending to the plaintiff those remedies against the person which belong exclusively to a court of equity; in effect, to allow again imprisonment for debt. This case has been followed in others,[92] and, not nothwithstanding the elaborate argument to the contrary by Mr. Justice Lowrie,[93] must be considered the undoubted rule in Pennsylvania.[94]

It is submitted that the doctrine of these cases is erroneous. The origin of equity jurisdiction in cases of specific performance was due to the inadequacy of the legal remedies, and this has re-

[91]Pitcairn v. Pitcairn, 201 Pa., 372.
[92]Deck's Appeal, 57 Pa., 467; Smatlz Appeal, 99 Pa., 310.
[93]Findlay v. Aiken, 1 Grant 63.
[94]Dorff v. Schmunk, 197 Pa., 300.

mained the test of the jurisdiction. Nevertheless the equity courts of England and of the other states of the Union have uniformly decreed specific performance in favor of the vendor, though the decree sought was simply one for the payment of the purchase money, on the ground that the remedies in equity are mutual.

When the legislature gave to the courts the power and jurisdiction of a court of chancery, it necessarily referred to the power and jurisdiction of courts of chancery in England or in the other states, for no court of chancery existed in Pennsylvania. And when the legislature stated that the courts should have the power of affording specific relief in cases "where a recovery in damages would be inadequate," it stated the test of equity jurisdiction in the same language as that in which it is stated in England, and other states, which do not hesitate to entertain a bill in favor of the vendor. The vendor's bill is entertained in other jurisdictions on the ground that the remedies in equity should be mutual, and the equitable doctrine of mutuality of remedies has been recognized, in other cases, by the courts of Pennsylvania.

When the vendor recovers the entire purchase price, either at law or in equity, the sum recovered is not awarded as "damages." When the purchase money is so recovered it is specific performance.[95]

The rule allowing a recovery of the purchase price in an action at law is peculiar to Pennsylvania and a few other states,[96] and it may be reasonably argued that in testing the adequacy of the remedies at law, the remedies afforded by *the common law* should be looked to, and not the remedies afforded by *the law of Pennsylvania* where "equity is so much a part of the law that the word law means both law and equity or either."[97]

Finally, the doctrine of these cases is not consistent with the doctrine of those cases which hold that the courts should construe liberally the statutes granting to the courts equity powers.[98] "By the act of 1836 the judges are not clothed with partial and dependent, but with full and independent powers over all the subjects therein mentioned."[99]

[95]Sunderland on Damages, 1610.

[96]Sunderland on Damages, 1608-10.

[97]Stockdale v. Ullery, 37 Pa., 487.

[98]Wesley Church v. Moore, 10 Pa., 273, Kilpatrick v. McDonald, 11 Pa., 381, Potter, Expansion of Equity in Penna.

[99]Penna. Lead Co's Appeal, 96 Pa., 116.

It is held that a vendor is entitled to come into equity for specific performance where the decree sought is not simply one for the payment of the purchase price but the vendor stands in need of specific relief which a court of equity alone can grant[1] In Kaufman's Appeal it is said, "There are cases where a vendor from a defect in his title or non-performance of a covenant in time, or other cause, is unable to come up to the legal standard of performance of his contract, but is still entitled to the aid of a court of equity; or where the vendee is bound to do some acts which a court of law cannot compel him specifically to perform and where damages would be an inadequate remedy. In such cases the vendor's bill falls within the head of equity power given by the act of 1836 of 'affording specific relief where a recovery in damages would be an inadequate remedy.' "

It is well settled that the courts of equity have jurisdiction to decree specific performance in favor of the vendee.[2]

The statutory grant of a distinctive chancery jurisdiction to afford "specific relief" does not in the least affect the power of the common law courts to give specific relief in the common law actions of ejectment and assumpsit.[3]

THE FOURTH SECTION OF THE STATUTE OF FRAUDS IS NOT IN FORCE IN PENNSYLVANIA.

The law of Pennsylvania concerning contracts for the sale of land presents some striking and instructive peculiarities due to the but partial adoption of the Statute of Frauds. Prior to the adoption of the Statute of Frauds in England, neither contracts for the sale of land nor conveyances of land were required to be in writing.[4] As civilization advanced and estates in land became more and more complex and divided in quantity of interest and time of enjoyment, and as the feudal restraints upon the alienation of lands from time to time wore off, written evidence of contracts for the sale of land and conveyances of land became more and more indispensible.

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[1]Kaufman's Appeal, 55 Pa., 386; Tierman v. Rowland, 15 Penna. 429; Findlay v. Aiken, 1 Grant 84.

[2]P. and L. Dig. Dec. col. 8615.

[3]Church v. Ruland, 64 Pa., 441; Corson v. Mulvany, 49 Pa., 48.

[4]Future interests and incorporeal hereditmanents were exceptions to the ordinary rule.

At last "to prevent a variety of frauds" Parliament passed the Statute of Frauds.[5] By this statute a writing was made necessary to the valid transfer of the title to real estate and all interests in lands which were of greater quantity than leases for three years. In addition to this, the fourth section provided that "no action shall be brought * * * * upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; * * * unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized."

In the first case reported in the reports of Pennsylvania it was decided that the English Statute of Frauds was not in force in Pennsylvania.[6] The reason given for the decision was that the statutes passed in England after the settlement of Pennsylvania had no force in Pennsylvania unless the colonies were particularly named therein. Since the Statute of Frauds was passed in 1677, four years before the granting of Penn's charter, and six years before the actual settlement of the province, it would seem to fall within the rule. The court, however, decided that though the statute was passed before the granting of Penn's charter, the Governor of New York had exercised jurisdiction in Pennsylvania before the passage of the statute, by virtue of the word "territories" in the grant to the Duke of York of New York and New Jersey, and that the statute was therefore not in force. The reasoning of the court in this case has been justly criticized, and it has been stated that "the true reason, probably, why the statute was not extended in practice to Pennsylvania was that its provisions were inapplicable to the simplicity of the earlier periods of Pennsylvania, and required greater expertness than practitioners of those days generally possessed."[7]

In 1772 the Pennsylvania statute of frauds was passed. The colonial assembly consolidated the first three sections of the English statute and placed it on the statute books of Pennsylvania. In regard to the ability of the drawer of the Pennsylvania statute Gibson, C. J., said, "It is evident from the masterly way in which they were consolidated by him that he was a lawyer of no little skill."[8] A careful comparison of the Pennsylvania

[5] 29 Car. II c. 3.
[6] Anon, 1 Dall., 1.
[7] Note to 1 Dallas, 1.

statute with the first three sections of the English statute fails to disclose any evidences of this "no little skill."

So much of the fourth section of the English Statute of Frauds as required contracts for the sale of lands to be in writing was not adopted in Pennsylvania. It was subsequently adopted,[9] but was repealed the next year.[10]

Whether the fourth section was intentionally omitted from the Pennsylvania statute cannot, at this day, be definitely determined. Chief Justice Tilghman and Mr. Justice Sharswood expressed the opinion that the omission could not have been accidental. In Pugh v. Good,[11] Gibson expressed an opinion to the contrary, and said that the fourth section must be taken to be a part of the common law of Pennsylvania, adopted by analogy to the British statute. But notwithstanding the desire of Gibson to incorporate the fourth section into "our own peculiar common law," it is not now, and never has been, with the exception of the brief period already mentioned, a part of the law of Pennsylvania.

The legislation of Pennsylvania may be thus summarized: the first three sections of the English statute are drawn into one which provides that estates created orally and "without a writing signed by the party creating the same," etc., shall have "the force and effect of estates at will only;" there is no provision corresponding to the fourth section of the English statute.

As a result of the distinctive legislation in Pennsylvania a peculiar condition of the law has arisen. The rules defining the conditions under which, and the extent to which, contracts for the sale of real estate may be enforced differ materially from those prevailing in England and in other states where the fourth section has been adopted. These rules and the reasons upon which they are based have been ably discussed in two previous numbers of this publication. It will be sufficient here to summarize them as follows:

(1) A purchaser is not entitled to the specific performance of an oral contract for the sale of real estate.

(2) A purchaser is not entitled to the specific performance of a written contract for the sale of real estate if the written contract

[8]Murphy v. Herbert, 7 Pa., 423.
[9]Act of April 22, 1856, P. L. 533.
[10]Act of May 13, 1857, P. L. 500.

is not signed by the vendor, even though it is signed by the purchaser.

(3) In either of the cases (1) or (2) a purchaser is entitled to specific performance if there has been such part performance on his part as to take the case out of the statute.[11]

(3) A purchaser is entitled to the specific performance of a written contract for the sale of real estate if the contract is signed by the vendor, even though it is not signed by the purchaser. and there has been no part performance.

(5) A vendor cannot recover in an action at law the purchase price agreed upon in an oral contract for the sale of real estate.

(6) If the purchaser by part performance has placed himself in a position to demand specific performance, the vendor may recover the purchase price in an action at law even though the contract is oral.[12]

(7) A vendor is entitled to recover in an action at law the purchase price agreed upon in a written contract for the sale of real estate, if the written contract is signed by the vendor, even though it is not signed by the purchaser. This is the rule although there has been no part performance by the purchaser. If there has been such part performance a still stronger case is presented.

(8) A vendor cannot recover in an action at law the purchase price agreed upon in a written contract for the sale of real estate if the contract is not signed by the vendor, even though it is signed by the purchaser.[13]

(9) A purchaser may recover in an action at law damages for the breach of an oral contract for the sale of real estate. In absence of fraud the measure of damages is the purchase money actually paid and the expense actually incurred. Damages cannot be recovered for the loss of the bargain. When the default on the part of the vendor involves fraud the measure of damages becomes enlarged so as to include the loss of the bargain. When no part of the consideration has been paid and no

[11]The essential elements of this part performance have been variously stated. See P. and L. Dig. Dec., Vol. 20, c. 3472.

[12]No Pennsylvania case has so decided but it would appear to follow from the reason on which rule (5) is based. See 6 Pom. Eq., 1291, 1352 and cases there cited.

[13]No Penna. case has expressly so decided but the rule follows from the reasoning on which rule (5) is based. But see Schultz v. Weir, 6 Sup. Ct. 573.

expense incurred and there has been no fraud, the damages are merely nominal.

(10) This (9) is the measure of damages even though the contract is in writing and by the vendor, or by both vendee and vendor.[14]

(11) A vendor may recover in an action at law damages for the breach of an oral contract for the sale of real estate. The measure of damages is the difference between the value of the land at the time of the breach and the sum agreed upon in the contract.[15]

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[14]This rule and the preceeding one do not result from the statute of frauds. They are due to other considerations.

[15]That the rule in this case is different from that in (9) has been overlooked by several learned writers. See Rood on the Statute of Frauds, Mitchell on Real Estate in Penna., Carner v. Peters, 9 Sup. Ct. 29.

MOOT COURT.

SAMUEL STOPE vs. R. R. CO.

Crossing a Railroad Track when told to do so by the Watchman.

STATEMENT OF FACTS.

At a crossing, the company had for several years maintained a watchman and safety gates. This watchman had acquired a good reputation for fidelity and care. He was never known to omit proper warnings to passengers about to cross the tracks and to close the gates when the approach of trains required. On July 3d, 1907, Stopes was approaching the tracks in a wagon, and was about to descend from it, in order to examine the tracks before driving upon them, when the watchman lifted the gate, that had been closed, and halloed to him to come on. Obeying, Stope drove upon the tracks when his wagon was truck and destroyed. His horse was killed. This is an action where he seeks to recover the value of the horse and wagon. Defense is contributory negligence. Evidence showed a speed of train of 50 miles an hour, in a borough of 9,000 people, where the crossing was, and a failure to whistle or ring the bell.

HANKEE for Plaintiff.

REIGHELDERFER for the Defendant.

YARNELL, J.—This is an action in which the plaintiff, Stope, seeks to recover the value of a horse and wagon destroyed by a train at a

railroad crossing. The defense offered is contributory negligence on the part of Stope.

Approaching the tracks, Stope was about to descend from his wagon and examine the tracks before driving upon them, when the watchman lifted a closed gate and told him to come on. Acting upon the invitation of the watchman, Stope drove upon the tracks when his wagon was struck and his horse killed.

The question to be decided is, did Stope in any manner contribute to his own injury?

The speed of the train and the failure to whistle or ring the bell may or rather do show negligence on the part of the R. R. Co., but no amount of negligence on the part of the Railroad Company will help Stope in this action if it can be shown that he neglected his duty or contributed to his injury. 127 Pa., 297, Lake Shore v. Frantz.

The rule that a person must stop, look, and listen, before attempting to cross a railroad track, is inflexible and admits of no exceptions; a failure to observe it is not merely evidence of negligence but is negligence per se.

Failure to give a signal does not relieve persons of contributory negligence in crossing railroad tracks at a crossing. 95 U. S., 697. In Greenwood v. R. R. Co., 124 Pa., 572, it is held that a person must observe the rule of stop, look, and listen, whether safety gates are maintained or not and whether or not the railroad company observes the speed regulations.

A point that deserves the most careful consideration, is the fact that the watchman invited Stope to come on when he was about to get down from his wagon and examine the tracks for himself.

There is a conflicting opinion as to whether looking and listening is necessary where there is a flagman and where the plaintiff stops. 42 N. Y. L. 180.

The rule in Pennsylvania is inflexible, however, and requires a substantial compliance with the rule—stop, look, and listen.

It is negligent to so far assume the care of the watchman, as to omit the use of one's own senses, for the detection of an approaching train, one's duty in this respect not being modified by the presence of safety gates or other contrivances for the public protection. 127 Pa., 297, Lake Shore & M. S. R. Co. v. F.

Safety gates were intended as an additional safeguard of public travel and not to relieve the traveler from any care otherwise due for his own protection. 124 Pa., 572, Greenwood v. Phil. W. & B. R. Co.

The flagman acts as an additional safeguard and is a necessity where there are gates.

Although extra precautions are taken by the company the duty for every traveler to stop, look, and listen, still exists. The fact that there is a flagman at the crossing does not dispense with the rule stop, look, and listen, even when the flagman beckons the traveler to cross. 25 W. N. C., 250.

Coleman v. P. R. R. Co., 195 Pa., 485, differs from this in that the action there was brought by a party who received his injury from being

in the rear of the wagon. He had no control over the horse as there was a driver on the seat. The case holds that the driver could not have recovered had he brought the action.

The rule of stop, look, and listen, is not a rule of evidence but an unbending rule of law which the jury can never be permitted to ignore. Here Stope was about to get down from his wagon and examine the tracks for himself but he did not and relied on the senses of the flagman. In this neglect of the rule, stop, look, and listen, he contributed to his own injury and is therefore remediless.

Plaintiff nonsuit.

OPINION OF THE SUPREME COURT.

That the defendant's negligence was a cause of the accident, the jury might well have found. Its train was running through a borough of 9000 inhabitants at a speed of 50 miles per hour. Nor did it whistle or ring a bell.

The question remains whether any negligence of the plaintiff contributed to the accident. It would not have happened, it is clear, if the plaintiff had not advanced upon the track. Was that act negligence? And who should decide whether it was or not?

That ordinarily, it would be the duty of a traveller, who is about to cross a track, to stop, look, and listen, is not to be questioned. The question here is, whether the fact made an exception. That fact is that the plaintiff did stop, and was about to look and listen, when he was caused to desist from the effort and immediately to advance upon the tracks by the direction of the flagman. There is perhaps, no case clearly holding that this act would not dispense from the duty of looking and listening. In Ihrig v. Erie Railroad Co., 210 Pa., 98, a flagman gave a signal to come on, but apparently it was directed not to the plaintiff but to one who was in a vehicle 30 or 40 feet in advance of him. The plaintiff was unable to say that the signal was intended for him. It is *said,* that the duty of stopping, looking, and listening, is absolute. In Coleman v. Penna. R. R., 195, Pa., 485, the trial court *said* that one who drives on a track, must stop, look and listen, although the watchman has given him a signal to cross, but the remark was *dictum.* In Greenwood v. Railroad Co., 124 Pa., 572, the safety gate was out of order, and for that reason, was not down. Greenwood and others, running with a hose-carriage to a fire, were not, for that reason, warranted to infer that there was no danger, and without stopping and looking, to dash across the track. Cf. Lohrey v. Penna. R. R., 36 Super. 287. In Lake Shore R. R. v. Frantz, 127 Pa., 295 the duty of stopping is indeed *said* to be "absolute and unyielding" but the remark was a dictum. The use made of the fact that the gates were raised was, not to exonerate the plaintiff from the duty of stopping, but to fasten negligence on the railroad company for its "blunting the edge" of the plaintiff's caution. Burd v. Railroad Co., 25 W. N. C. 250, a common pleas decision is of little value, since no opinions are given. Cohen v. Pa. R. R. 211 Pa., 227, apparently assumes that the traveller must stop, look and listen, before going upon the first of several tracks. But the accident did not occur on the first track.

The safety gates were up, but that fact did not relieve from the duty of ordinary care, before venturing on the second or third tracks. The omission to stop, look and listen, before thus venturing, however, was not negligence *per se.*

That the invitation of the flagman to cross may legitimately influence the decision of the driver, is conceded in some cases. "It may be conceded," says Dean J., Ayers v. Railway Co., 201 Pa., 124, "that if the track had been as visible to him as to the flagman, he could not without negligence have disregarded his own sense of sight and have relied on the mistake or carlessness of the flagman. But plaintiff could not see a train, and heard no warning. He knew the flagman was experienced and could see. Why should he not cross? He could see no train; the flagman who could see and was placed there to see, in effect said to him there was none. Under such circumstances we cannot say there was an absence of ordinary care in plaintiff relying on the sight of the flagman, when, because of the freight train, his own could not avail him." In Fennell v. Harris, 184 Pa., 578, reliance on a signal of the watchman was held not inconsistent with requisite care.

It is intimated in some cases, that before entering on the first track, the traveller *must* in every case, stop, look and listen; but that, having passed the first second or third track safely, whether he must stop, look and listen before entering upon the second, third or fourth track must be decided by the jury and not by the court. But, it is quite clear that justifications similar to those for crossing the second, third or fourth track without stopping, etc., might exist, for crossing the first, without stopping. The situation might be such that oncoming trains could not be seen or heard a sufficient distance to avoid collision. What then would be the use of stopping? The practicable place for stopping might require the driver to dismount, run ahead some distance, then run back, remount, and drive over the interval, so losing sufficient time to bring on the train soon enough to collide with him. In such a case it might be more sensible to trust the eyes and ears of a flagman at the track, than to insist on applying one's own eyes and ears. The traveller may be blind. Surely he would not be expected then to prefer his own eyes to those of the watchman. He might be deaf. Must he then use his own ears? It is indeed a hard saying that in no case may one about to cross a track, even when commanded by the watchman to do so, accept the testimony of the senses of the latter, as a substitute for his own. Stope actually stopped. We are bound to assume that it was at the proper place. He was about to get out and run forward to the track when the shout of the flagman induced him to desist.

We think the learned court should not have decided, but should have allowed the jury to decide, whether this act of the plaintiff was negligent. In P. & R. R. R. v. Boyer, 97 Pa., 91, the court below said that the driver of a street car, which was struck by a train, was not bound to stop, look and listen, since the flagman had beckoned to him to cross. The accuracy of this instruction was denied by Gordon J., only because there was conflicting evidence whether the flagman did thus beckon, and because it appeared that another man had called and gestured

to the driver not to cross, so that he had warning of danger. Gordon J., remarks "Surely he ought to have stopped, looked for himself *or asked the flagman so to do,* and this the more so, as Spencer was doing all in his power to warn him of the coming danger." Evidently Gordon J., had not yet discovered that it would be negligent to trust to the assurance of the flagman's own observations.

We are aware that the authorities are in conflict upon the question here involved. See W. P. R. R. v. Rosewater, 157 Fed. 168; 15 L. R. A. N. S. We are unwilling to say, without regard to the circumstances, that despite the direction of the company's watchman, not to look and listen, despite his assurance that he sees nothing and hears nothing to induce hesitation to cross the track, the traveller is per se negligent, if he fails to stop, look and listen. The question, we think, should be submitted to the jury.

Judgment reversed with v. f. d. n.

ISIAIAH SHERBAN vs. JOHN GERDY.

Assumpsit—Conditional Sale—Rescission of Contract.

STATEMENT OF FACTS.

Gerdy let to Sherban for one year an engine. The value of the engine was $600. Sherban was to pay each month as rental $50. Within a month after the expiration of the year, having paid the monthly installments, he might pay $20 additionally, whereupon Gerdy was to make him a bill of sale. After paying ten installments monthly of $50 Sherban was unable to pay, and did not pay, any more. Within one month after the expiration of the year, Gerdy brought replevin and recovered the engine. Alleging that this was a rescission of the contract, and that the $50 installments were, for the most part, not rentals but fractions of the price of the engine, Sherban sues to recover a proper proportion of the money paid. He alleges that a fair rental for the year could not have exceeded $100 and that he should recover $400. Whereupon he brings this suit.

MAUCH for Plaintiff.

SILVERMAN for Defendant.

OPINION OF THE COURT.

JENKINS, J.—We think that Sherban is clearly entitled to recover the $400 being the amount paid by him to Gerdy in excess of the fair rental value.

Justice Dean in Seanon and Bierer Appellants vs. McLaughlin, 165 Pa. 150, says: "On default in payment the plaintiffs were not bound to accept the machine or retake possession of it, they could have entered judgment on the bond and levied on the machine and any other property of the defendant in satisfaction of their demand. But they rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered judgment on their bond and issued execution and levied on other property of the defendant,

which they had no right to do, for the contract to which the bond was collateral, no longer existed."

There being no contract between Sherban and Gerdy as soon as the latter chose to exercise his right and retake the machine, he was indebted to plaintiff for sum previously paid to him on the strength of such agreement.

In Campbell vs. Hickok, 140 Pa. 290, the court held: "The company had its remedies for the enforcement of their rights, one in affirmance of the contract by suit upon the note, or they might rescind the contract and repossess themselves of the property, in which case the Company were to have and enjoy the said property as though the contract had never been made. The notes were given in consideration of the agreement, or of the hire of the property. The agreement and the notes were part and parcel of the one transaction. If the agreement had never been made, the notes would not have been given, and when the agreement is rescinded with like effect as if it had never been made, the notes fall with it for want of consideration." This same doctrine is held in Scott vs. McHugh Appellant, 151 Pa., 630.

Justice Mestrezat, in the Roller Co. vs. Schlimme, 220 Pa. 413, says: "The failure to make the payments as they became due was a breach of the contract, and the plaintiff had a right to rescind and take possession of the rollers and remove same without trespass. There was one condition however imposed upon the plaintiff Company's action in this respect, and that was that if it took possession of the machinery and thereby rescinded the agreement, it could not demand payment of the unpaid installments of the money provided for in the contract. When the plaintiffs asserted their right to rescind by repossessing itself of the machine, they waived their alternative right to enforce the agreement by compelling the payment of the purchase money. The remedies were alternative not cummulative. The right to repossess itself of the machinery was not confined to any period of time. The Company could take the machine in default of payment of any of the installments, or, at its own pleasure, it could wait until all of the consideration money was due, at any time thereafter take possession of the machine. Act of plaintiff was a rescission of the contract and deprived the plaintiff of any right of action on the contract, or on the notes, to enforce payment of the money stipulated to be paid. The plaintiff cannot retake the machine, and at the same time demand payment of its value. The contract does not so specify and justice will not permit it."

All of the above cases hold that the retaking of the machine amounts to a rescission of the contract. If the vendor chooses to rescind the contract it is imperative that he return the consideration paid "On the ground of fraud, failure of consideration, and the like, rescission of the contract is a right in equity, subject to a restoration of the consideration, consequently in order to obtain equity, it lies on the party seeking to do equity; that is to say, he must return the property obtained or reconvey the title." 61 Pa. 427. "In the rescission of a contract, the very first thing to be done after showing that the plaintiff parted with the thing in pursuance of the contract alleged, is to show that the plaintiff has

rescinded the contract by doing, or offering to do, all that was necessary and reasonably possible to restore the party to the condition in which they were before the contract and then to show that he has good grounds for rescinding it." 44 Pa. 9; 30 Pa. 145; 2 Watts, 433.

Before Gerdy undertook to repossess himself of the machine, he should have tendered Sherban the amount paid by him in pursuance of the contract, and he is liable to Sherban for the $400 on account of his failure so to do, and judgment is accordingly entered for the plaintiff.

OPINION OF SUPERIOR COURT.

The decision of the learned court below is well sustained by the authorities cited. If, as is held in Road Roller Co. v. Schlinne, 220 Pa., 413 the vendor-bailor could not recover on notes given for installments that had alredy fallen due after the retaking of the rollers, because such retaking was in virtue of a rescission, and because, upon rescission, the vendor-bailor is not entitled to the contract money, it follows that upon rescission, installments already paid should be recoverable by the bailee-vendee.

The case referred to failed to take note of the fact that the bailee-vendee had had the rollers for over two years and had been using them. They were probably not in as good condition as when they were delivered. No compensation for this use was allowed. In order to do justice, it will be necessary to feign a contract that the bailee-vendee will pay for such use, what it is reasonably worth. It is found that a fair rental of the engine would have been about $100 and this has been deducted from the money paid by the bailee-vendee.

Judgment affirmed.

JOHN EDWARDS vs. THOM. McFARLANE.

Sale of Land—Fraud in Making Deed—Reformation.

STATEMENT OF FACTS.

McFarlane employed Jones to sell land. He had a piece containing four acres rectangular with a front of 70 feet on X street. Jones prepared a deed which embraced the whole tract for the consideration of $800 and which Edwards approved. The deed was sent to McFarlane for execution. He resolved to sell only a part of this tract, fifty feet in front, but for $800. The deed was sent to Edwards, who, keeping it two weeks, paid the $800. Six months later, alleging that he had not read the deed, he insisted on a rectification of it so as to embrace the whole tract. McFarlane declining, Edwards filed a bill asking the court that McFarlane be compelled to execute another deed.

CASE for Complainant.

BROWN for Respondent.

OPINION OF COURT.

MAUCH, J.—This is a bill seeking to rectify an executed deed so that it may conform to an agreement previously entered into by the

parties to this suit. The fact, that the deed in question does not conform to the agreement, is uncontroverted. And "it is plain that if the instrument has not been drawn so as to express the true intention of the parties, the only true measure of justice in such a case is the equitable remedy by reformation, or correction, by means of which the instrument is made to conform to the intention of the parties, and is then enforced in its corrected shape." Bispham's Equity, 646.

To reform a contract, and then enforce it in its new shape, it must appear from the facts that there was a mistake on the one side, and a fraud on the other. 192 Pa. 19.

Do the facts, as presented in this case, justify us in saying that there was fraud on the part of McFarlane and mistake on the part of Edwards?

Fraud in equity has a wider signification than it has at law. Equity takes cognizance of every possible kind of fraud from a *civil* point of view. Courts of equity have, however, refrained to lay down anything that approaches a satisfactory definition of fraud. So this court, with a latent wisdom born of patient ignorance; reverently follows precedent, for "the simple reason that the courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrongdoer to escape from the power of equitable redress."

In this case McFarlane was desirous to sell a certain piece of land, and Edwards was a prospective buyer. McFarlane's agent prepared a deed which embraced the whole tract for the consideration of $800 and which Edwards approved. The deed was sent to McFarlane for execution. He resolved to sell only a part of the tract, 50 feet in front, but for $800. The deed was sent to Edwards, who keeping it two weeks, paid the $800.

Was the non-disclosure of this resolution on the part of McFarlane something "that was calculated to deceive?" Was it an "artifice by which" Edwards "was deceived to his disadvantage?" 90 Pa. 250. We think it was. Edwards approved the deed as prepared by the agent, and if McFarlane wished to make any changes, it was his clear duty, from "what has passed in the transaction" and the "relationship between the parties," to disclose it. And "where disclosure becomes a duty, such silence is a fraud." 93 Pa. 107.

A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. Mistake may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Where the mistake arises from imposition or misplaced confidence, relief may be had on the ground of fraud. 134 N. Y. 62.

Relief, when deeds or other instruments are executed by mistake or inadvertence, as well as upon false suggestions, is a common head of equity jurisdiction. 153 Pa. 134.

The mistake of Edwards was such as any reasonable man might make; and McFarlane was well aware of this fact. And again, reason-

ableness of the mistake is not so much the criterion to go by, as the fact that the mistake was *actually* made.

The defendant, however, contends that Edwards should be denied relief because he was guilty of laches and negligence; that he has an adequate and complete remedy at law. "Laches and negligence are always discountanced. Nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence, and where these are wanting, the court is passive and does nothing." A court of equity does not encourage stale claims, and a party may lose his right to complain of a fraud by his delay. There is no certain rule as to the length of time which will bar the right to relief in cases of fraud. What is a reasonable time must depend upon the discretion of the court, the exercise of which will be regulated by the circumstances of the particular case. In 4 Howard 503, it was said: "Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within 30 years after it has been discovered or become known to the party whose rights are affected by it."

In view of the above case and the circumstances of the case at bar, would it be an abuse of the discretion placed in us if we held Edwards innocent of such laches and negligence as would defeat his claim? The mere omission to take advantage of means of knowledge within the reach of the party paying does not prevent recovery. 173 Pa. 579.

A court of law may construe and enforce an instrument as it stands, or may refuse, upon proper cause shown, to give any effect to it, or may treat it as a nullity. 90 Pa. 228. But if the instrument has not been drawn so as to express the true intention of the parties, to enforce it in its existing condition would be simply to carry out the very mistake or fraud complained of; while to set it aside would deprive the complainant of those advantages under the contract, to which he is lawfully entitled.

It is obvious, therefore, that the only true measure of justice in such a case is the equitable remedy by reformation, by means of which the instrument is made to conform to the intention of the parties,, and is then enforced in its corrected shape.

Decree entered accordingly.

OPINION OF SUPERIOR COURT.

Courts of equity cannot make contracts for parties. If parties have made a contract, and the writing which they cause to embody it fails in some respect to do so, courts of equity may reform the writing so that it shall correspond with the real understanding of the parties. Is this the reformation that is sought by the bill?

Jones the agent of McFarlane, prepared a deed purporting to convey a tract of land 70 feet in width belonging to McFarlane, for $800. Jones had had no authority to sell more than 50 feet of this tract, and when he sent the deed to McFarlane for execution, the latter declined to execute it. Another deed for the 50 feet was drawn up, and was sent to Edwards, who had agreed to buy the 70 feet for $800, and had assented to the first

deed. Edwards, not observing that the second deed sent to him differed from the first, kept it for two weeks and then paid the $800. Six months later he discovered the fact. He now asks the court to compel McFarlane to execute a deed like the first.

Since McFarlane never intended to sell the 70 feet for $800, to compel him to make a deed for it, would be to force on him a contract to convey and a conveyance, into which he has never consented to enter; would be, not to reform the deed so as to correspond with the intention of the two parties, but to substitute for it one agreeing with the intention of the grantee, while wholly disagreeing with that of the grantor.

It may be that Edwards is entitled to relief of some sort. He has not obtained what he supposed that he was obtaining. He would probably not have desired the 50 feet actually got by him, separate from the other 20 feet or at all events, he would not have been willing to pay $800 for the 50 feet. What then? The remedy to which he is entitled, if any, is the return of the purchase money, upon his return of the deed, or upon his reconveyance of the 50 feet. It is inequitable to allow him to compel McFarlane to aliene to him the 20 feet without the compensation for which alone McFarlane would be willing to convey it. Coppes v. Keystone P. & F. Co., 36 Superior, 38.

Decree reversed and bill dismissed.

BOOK REVIEW.

The Law of Inter-Corporate Relations, by WALTER CHADWICK NOYES, Little, Brown & Co., Boston, 1909.

This is the second edition of a book which first appeared in 1903, made necessary, as the author states, by the "development" of the law since the appearance of the first edition. The work deals with the consolidation of corporations, sales of corporate property, corporate stockholding, holding corporations, combinations among corporations, leases of corporate property, and franchises, the anti-trust federal statute, and allied top cs. It is easy to discern, from this summary, the vast importance of the subjects dealt with. The profession had learned the value of this work from its first edition. The second notably enhances its serviceableness. The statements of law are clear and precise and the citations full. As in the case of all the books issued by Little, Brown & Co., paper is fine, and the letter-press all that could be desired. The new edition can be earnestly commended to the attention of that large number of lawyers that have to do with corporate problems.